10

MOTION FILED
SEP 1 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1114 *ET AL.*

THE PEOPLE OF THE STATE OF CALIFORNIA, *ET AL.*,

Petitioners,

vs.

SOUTHLAND ROYALTY COMPANY, *ET AL.*,

Respondents.

On a Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS AND BRIEF *AMICUS CURIAE*

FREDERICK MORING
JAMES A. WILDEROTTER
PHILIP M. MARSTON
1800 M Street, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae

Of Counsel:

Morgan Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

August 31, 1977

DI CESARE - Printing — 331-4101 — Washington, D.C. 20004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76—1114 *ET AL.*

THE PEOPLE OF THE STATE OF CALIFORNIA, *ET AL.*,

Petitioners,

vs.

SOUTHLAND ROYALTY COMPANY, *ET AL.*,

Respondents.

On a Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Associated Gas Distributors (AGD)[1] hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of attorneys for petitioners has been obtained, but counsel for respondent Southland Royalty Company, *et al.* objected on the grounds that AGD's brief might address "broader issues than those directly raised by the facts of this 50-year, fixed-term lease." AGD believes it most important for this Court to address those "broader issues" and, accordingly, files the present motion pursuant to Rule 42(3).

[1] A list of AGD member companies is attached.

I

STATEMENT OF INTEREST

Associated Gas Distributors is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard or approximately 25 percent of the Nation's natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for pipeline gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in substantial volumes of flowing supplies being diverted to intrastate markets and may seriously disrupt the stability of interstate dedications of natural gas in the future. Accordingly, AGD member companies may be adversely and directly affected by the outcome of the present case.

II

REASONS FOR GRANTING THE MOTION

On its face, the decision of the Court of Appeals applies only to the disposition of natural gas production from two 50-year, fixed-term leases that were entered into some 13 years before the Natural Gas Act was passed. That decision held that, notwithstanding the provisions of Section 7(b) of the Natural Gas Act, service could be effectively abandoned at the expiration of the underlying lease. The opinion failed to address either the question of the need to apply federal law, or the impact that applying Texas law may have on gas consumers served through the interstate market. The approach adopted by the Court of

Appeals, if affirmed, will have serious and far-reaching implications for the stability and security of interstate gas supplies. Over the last ten years, the percentage of new gas discoveries dedicated to the interstate market has dropped precipitously, making the security of flowing supplies all the more crucial to adequate interstate service. *See* Appendix. Yet the decision of the Court of Appeals would allow even these flowing supplies to be diverted from interstate sales upon expiration of the underlying leases, completely free from Commission scrutiny under Section 7(b) of the Natural Gas Act.

Future transactions will be structured to utilize state property laws in circumvention of effective federal regulation. For example, landowners could insist upon short-term leases, thereby obtaining the benefit of immediate access to interstate markets, but retaining the option of diverting the gas to intrastate sales upon expiration of the short term lease.

All of the petitioners have consented to AGD's filing of a brief *amicus curiae*. Although they may be expected to advance generally the interests of natural gas purchasers, none of them represents the East Coast purchasers that have been affected most deeply by continuing curtailment of natural gas deliveries.

This Court must look beyond the narrow question, as defined by respondents, to the issues of security and stability of present and future interstate natural gas supplies and the integrity of federal jurisdiction under the Natural Gas Act.

III

CONCLUSION

Accordingly, and for the above reasons, Associated Gas Distributors respectfully urge the Court to grant the present motion so that AGD may present its views in the attached brief.

Respectfully submitted,

FREDERICK MORING
JAMES A. WILDEROTTER
PHILIP M. MARSTON
Attorneys for
ASSOCIATED GAS
DISTRIBUTORS

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

(202) 872-5000

August 31, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76--1114 *ET AL.*

THE PEOPLE OF THE STATE OF CALIFORNIA, *ET AL.*,

Petitioners,

vs.

SOUTHLAND ROYALTY COMPANY, *ET AL.*,

Respondents,

On a Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS AND BRIEF *AMICUS CURIAE*

FREDERICK MORING
JAMES A. WILDEROTTER
PHILIP M. MARSTON
1800 M Street, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae

Of Counsel:

Morgan Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

August 31, 1977

DI CESARE - Printing -- 331-4101 -- Washington, D.C. 20006

INDEX

TABLE OF CASES i

INTEREST OF AMICUS CURIAE 2

ARGUMENT 2

I. The Decision of the Court of Appeals Nullifies The Requirement That Natural Gas Service In Interstate Commerce May Not Be Abandoned Without Prior Approval Of The Federal Power Commission ... 2

II. If Allowed To Stand, The Decision Of The Court Of Appeals Will Have Adverse Implications For Interstate Consumers Beyond The Facts Of This Case 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDIX A-1

TABLE OF AUTHORITIES

CASES: Page

Atlantic Refining Company v. Public Service Commission of New York (CATCO), 360 U.S. 378 (1959) 11

Burnet v. Harmel, 287 U.S. 103 (1932) 8

California v. Lo-Vaca Gathering Company, 379 U.S. 366 (1965) 7

Commissioner of Internal Revenue v. Tower 327 U.S. 280 (1946) 8

Federal Power Commission v. Transcontinental Gas Pipe Line Corporation, 365 U.S. 1 (1961) 7

Hunt v. Federal Power Commission, 306 F.2d 334 (5th Cir. 1962) 6

Billy J. McCombs v. Federal Power Commission, 542 F.2d 1114 (10th Cir. 1977) 4

Morgan v. Commissioner of Internal Revenue, 309 U.S. 78 (1940) 8

Phillips Petroleum Company v. Federal Power Commission, 556 F.2d 466 (10th Cir. 1977) 9

Smith v. Hoboken Railroad Warehouse and Steamship Connection Company, 328 U.S. 123 (1946) 4, 5, 7

Sun Oil Company v. Federal Power Commission, 364 U.S. 170 (1960) 6

Sunray Mid-Continent Oil Company v. Federal Power Commission, 364 U.S. 137 (1960) 5, 6, 7, 8, 9

Thompson v. Texas Mexican Railway Company, 328 U.S. 134 (1946) 5, 7

United Gas Improvement Company v. Continental Oil Company, 381 U.S. 392 (1965) 6

United States v. Little Lake Misere Land Company, 412 U.S. 580 (1973) 7

Wissner v. Wissner, 338 U.S. 655 (1950) 8

OPINIONS AND ORDERS OF THE FEDERAL POWER COMMISSION

Arkansas Louisiana Gas Company v. Amarex, Inc., Opinion Nos. 798 and 798-A (May 9, 1977 and July 1, 1977), *appeal docketed sub nom. Amarex, Inc. v. FPC*, No. 77-1503 (10th Cir. July 7, 1977). 9

Briercrest Oil Company, Docket No. C176-396, Order Maintaining Service *Pendente Lite* And For Interim Protection (March 12, 1976), Order Denying Rehearing, Granting Interventions, Clarifying Orders, And Denying Motion, (May 7, 1976) 8

Dore Corporation, et al., Docket No. C176-316, Order Maintaining Service *Pendente Lite* And For Interim Protection (March 12, 1976), Order Denying Rehearing, Granting Interventions, Clarifying Orders, And Denying Motion, (May 7, 1976), *appeal docketed*, No. 76-2428 (5th Cir. May 24, 1976) 8

Kerr-McGee Corporation, et al., Docket No. C176-405, Order Maintaining Service *Pendente Lite* And For Interim Protection (March 12, 1976), Order Denying Rehearing, Granting Interventions, Clarifying Orders, And Denying Motion, (May 7, 1976), *appeal docketed sub nom. The Fort Worth National Bank*, etc. *et al. v. FPC*, No. 76-2808 (5th Cir. July 1, 1976) 8

Murphy Oil Corporation, Docket No. R175-109, Order Modifying Initial Decision (July 6, 1977) 10

Henry Clay Sullivan, et al., Docket No. C176-316, Order Maintaining Service *Pendente Lite* And For Interim Protection (March 12, 1976), Order Denying Rehearing, Granting Interventions, Clarifying Orders, And Denying Motion, (May 7, 1976), *appeal docketed*, No. 76-2428 (5th Cir. May 24, 1976) 8

Transco Exploration Company, Docket No. C177-306, Order Granting Rehearing For Purposes of Further Consideration, (August 17, 1977) 10

STATUTES

Interstate Commerce Act, Section 1(18), as added by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478, 49 U.S.C. 1 (18) 4

Natural Gas Act, 52 Stat. 821, 15 U.S.C. §717 *et seq.* passim

§4(c) 9
§4(d) 9
§7(b) ..... passim

MISCELLANEOUS

2 Williams and Meyers, *Oil and Gas Law*, (1975)..... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76—1114, *et al.*

THE PEOPLE OF THE STATE OF CALIFORNIA, *ET AL.*

Petitioners,

vs.

SOUTHLAND ROYALTY COMPANY, *ET AL.*,

Respondents

On A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Whether the jurisdiction of the Federal Power Commission over the certificated natural gas service of a mineral lease owner lapses automatically upon expiration of the underlying mineral lease.

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD)[1] is an unincorporated association of gas distribution companies serving over 11 million customers along the Eastern Seaboard, or approximately 25 percent of the nation's natural gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for pipeline gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in substantial volumes of flowing supplies being diverted to intrastate markets and may seriously disrupt the stability of interstate dedications of natural gas in the future. AGD membership companies will be adversely and directly affected if the decision of the Court of Appeals is upheld. Accordingly, AGD submits the present brief *amicus curiae* in support of petitioners.

ARGUMENT

I. The Decision Of The Court Of Appeals Nullifies The Requirement That Natural Gas Service In Interstate Commerce May Not Be Abandoned Without Prior Approval Of The Federal Power Commission

The Court of Appeals reversed the decision of the Commission on the deceptively simple basis that:

> "a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest." 543 F.2d at 1137.

This holding would nullify the primary function of Section

[1]A list of AGD member companies is attached.

7(b) of the Natural Gas Act[2] which is to protect the interstate consumer from abrupt termination of natural gas service on which he has come to rely, without permission and approval of the Federal Power Commission. That purpose applies with equal force to termination of service by natural gas producers as well as by interstate pipeline transmission companies.

The starting point of interstate natural gas service, in most cases, is the granting of a mineral lease for the exploitation of underlying hydrocarbons. If expiration of such a lease automatically obviates the need for Commission abandonment authorization, the scope of Section 7(b) is greatly reduced. Upon termination of the underlying lease, certificated service would automatically be freed of the requirement of the Natural Gas Act that abandonment is to be permitted only where the Commission determines "that the present or future public convenience and necessity permit such abandonment."

In enacting Section 7(b), Congress did not so limit its scope. Rather, the language requires Commission approval prior to the termination of "*any* service," and authorizes termination of interstate service on only two grounds. First, service may be abandoned when the natural gas reservoirs underlying the certificate service are exhausted to the extent that "continuance of service is unwarranted." Second, abandonment may be warranted where the Commission finds that it is otherwise in the public interest.

That Congress required abandonment proceedings even

[2]Section 7(b) provides that:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or *any service* rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, *or that the present or future public convenience and necesity permit* such abandonment. 15 U.S.C. §17 f(b). (Emphasis added).

when the natural gas reservoir underlying certificated service is exhausted confirms the broad construction of Section 7(b) required in the present case. Even though Congress could obviously not affect the physical fact of depletion, the Natural Gas Act explicitly requires natural gas companies to seek abandonment authorization *prior* to terminating interstate service. Since Congress mandated abandonment proceedings even in the face of physical impossibility, it follows *a fortiori* that Section 7(b) applies in the case of claimed *legal* impossibility.[3] The key in both cases is that there must be an opportunity for the Commission to determine whether the cessation of service, upon which interstate consumers have relied, is permitted by the public convenience and necessity.

The Commission may find abandonment at the expiration of a lease to be in the public interest. In fact, the case may be somewhat appealing when the lease was entered into a half-century earlier. But in many cases, abandonment merely because the underlying lease has expired may prove contrary to the public interest. In any event, the determination is vested exclusively in the expertise of the Commission, subject only to judicial review.

Decisions of this Court interpreting the Natural Gas Act or similar language in other legislation have further emphasized that the key to abandonment is whether there is a withdrawal of interstate *service*, not the expiration of underlying leases or contracts. In *Smith v. Hoboken Railroad Warehouse and Steamship Connection Company*, 328 U.S. 123 (1946), the Court construed Section 1(18) of the Interstate Commerce Act (added by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478), upon which Section 7(b) of the Natural Gas Act was

[3]The recent decision of the Court of Appeals for the Tenth Circuit in *McCombs v. FPC*, 542 F.2d 1144 (10th Cir. 1977), is not to the contrary. There the Commission acknowledged the fact that there had been no production for an extended period, but merely sought an abandonment application "for the record". 542 F.2d at 1148. The Court of Appeals held that there had been an abandonment, even though no formal FPC abandonment proceeding had taken place. This judicial recognition of "*de facto* abandonment" is not applicable to the present case in which the Commission has specifically ruled that abandonment authorization must be sought.

modeled.[4] In *Hoboken Railroad*, a lease entered into prior to the 1920 Act was terminated pursuant to its terms and the question arose whether the lessor was obligated to continue operations under the terms of the ICC certificate. The Court held that an abandonment certificate was required under Section 1(18) "whether the lessee or the lessor is abandoning operations." 328 U.S. at 130.

In the companion case of *Thompson v. Texas Mexican Railway Company*, 328 U.S. 134 (1964), the Court similarly held that despite the termination of a "trackage" agreement allowing one carrier to operate its trains over the tracks of another, abandonment authorization was still required under Section 1(18). 328 U.S. at 144-145. Moreover, the Court explicitly noted that it was immaterial that the trackage contract (like the lease in *Hoboken, supra*) was entered into prior to enactment of the abandonment provisions. *Id.* The obligation to continue service under the lease or under the trackage contract was not one imposed by the parties, but by the supervening action of Congress.

The analogue under the Natural Gas Act to *Texas Mexican Railway, supra*, is *Sunray Mid-Continent Oil Company v. FPC*, 364 U.S. 137 (1960). In *Sunray*, the Court rejected the contention that the duration of a permanent certificate could be controlled by the term of the gas sales contract of the parties. After discussing the language of the Natural Gas Act and emphasizing that abandonment of the interstate service must be reviewed by the FPC irrespective of the expiration of the term of the sales agreement, the Court concluded that a contrary result would make effective regulation turn on the "desire of the regulated enterprise to be subject to it." *Sunray, supra*, 364 U.S. at 151. (Footnote omitted). Responding to the contention that its decision interfered with the "integrity" of the contract, the Court noted that:

[4]*See* testimony of John E. Benton, General Solicitor, National Association of Railroad and Utility Commissioners, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., at 98 (1936).

> "[t]he obligation that petitioner will be under after the contract term will not be one imposed by contract but by Act."

Id. at 155. *See also Sun Oil Company v. FPC*, 364 U.S. 170 (1960). The obligation to continue interstate service was described aptly by the Court of Appeals in *Hunt v. FPC*, 306 F.2d 334, 342 (5th Cir. 1962):

> "Like the ancient covenant running with the land the duty to deliver and sell flows with the gas from the moment of first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under §7(b)."

In *United Gas Improvement Company v. Continental Oil Co.*, 381 U.S. 392 (1965) (hereafter cited as the *Rayne Field* case), after the Commission had refused to certificate a conventional sale to an interstate pipeline company, the parties restructured the transaction as the sale of the producer's mineral lease interest, rather than the natural gas produced from it. The Commission held initially that it had no authority over the sale of leases as opposed to the sale of natural gas. That determination was reversed on appeal to this Court. The Court made clear that the result did not assume that the new transaction was not in good faith. 381 U.S. at 400. But the opinion of Mr. Justice Harlan focused on the "significant and determinative economic fact," 381 U.S. at 392, that the restructured transaction accomplished the transfer of large amounts of natural gas to an interstate pipeline for resale.

In the present case, the Court of Appeals allowed legal forms to govern the result, rather than the economic reality of abandoned natural gas service. Yet as noted above, the provisions of Section 7(b) of the Natural Gas Act are directed specifically to the termination of interstate *service*, not to the expiration of contractual rights or obligations which may bind the parties under state law. *Sunray, supra*, 364 U.S. at 150-151.

Just as the abandonment provisions of the Transportation

Act of 1920 applied equally to contracts, *Texas Mexican Railway*, or to the underlying leases, *Hoboken Railroad*, so the similar provision of the Natural Gas Act must apply to the underlying leases in this case as well as the sales contracts at stake in *Sunray*.

There is nothing unusual or unique in the extension of federal jurisdiction to the reversionary owners in this case. The ICC cases noted above confirm that fact. Nor is it unusual for federal law to displace "black letter" state property rules that conflict with a federal regulatory scheme.

In *United States v. Little Lake Misere Land Company*, 412 U.S. 580 (1973), the Court held that federal law governed the interpretation of a federal land acquisition authorized by the Migratory Bird Conservation Act, 16 U.S.C. §715 *et seq.* In so holding the Court declined to follow Louisiana property law:

> "Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision. . . ."

412 U.S. at 592. Although the present case differs in that the federal government was not a party to the 50-year leases in question, it raises serious questions as to the ability of the FPC to assure the integrity of regulation under the Natural Gas Act. Allowing the term of the certificate to be determined by the expiration of the underlying lease under state law, would create a gaping hole in the regulatory scheme. Rather than closing off an "attractive gap" between federal and state regulation, the decision below creates a new gap, contrary to the intent of Congress in enacting the Natural Gas Act, *FPC v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 22 (1961); *California v. Lo-Vaca Gathering Company*, 379 U.S. 366, 370 (1965).

The Court has also declined to recur to local personal

property rules in determining the disposition of insurance proceeds payable under the National Service Life Insurance Act, *Wissner v. Wissner*, 338 U.S. 655 (1950). In the area of federal taxation, the refusal to follow the characterization of a transaction under state property law is commonplace. *See e.g. Morgan v. Commissioner*, 309 U.S. 78, 80 (1940) ("federal law must prevail no matter what name is given to the interest or right by state law"), and *Commissioner v. Tower*, 327 U.S. 280 (1946). *See also Burnet v. Harmel*, 287 U.S. 103 (1932), holding that the fact that an oil and gas lease is treated as a sale of oil in place by state law is immaterial in deciding whether it is a "sale. . . of capital assets" under federal law.

The Court of Appeals erred by assuming that abandonment authorization was not required merely because, *under Texas law*, the lessees could do nothing to affect the reversionary interest. The fundamental error in the decision was to apply state law. Paraphrasing this Court's language in *Sunray, supra*, the obligation that the lessor is under after expiration of the lease term is not one imposed or created by the lessee, but by the Natural Gas Act itself. Federal, rather than state, law governs.

II. If Allowed To Stand, The Decision Of The Court Of Appeals Will Have Adverse Implications For Interstate Consumers Beyond The Facts of This Case.

The importance of this proceeding is not limited to cases where long-term gas leases expire and the reversionary interests seek to divert production to more profitable intrastate sales.[5] At

[5]There are, however, a number of other pending proceedings involving lease expirations. *See* FPC orders issued March 12, 1976, holding in abeyance further proceedings in the following cases, pending decision on appeal in the present case:

1) *Kerr McGee Corporation, et al.*, Docket No. C176-405 (expiration of 50-year fixed term lease) *app. docketed sub nom. The Fort Worth National Bank*, etc., *et al. v. FPC*, No. 76-2808 (5th Cir. July 1, 1976);
2) *Henry Clay Sullivan, et al.*, Docket No. C176-316, *app. docketed*, No. 76-2428 (5th Cir. May 24, 1976);
3) *Dore Corporation, et al.*, Docket No. C176-315, *app. docketed* No. 76-2428 (5th Cir. May 24, 1976); *and*
4) *Briercrest Oil Company*, Docket No. C176-396.

issue, rather, is the ability of the FPC to assure stable and reliable supplies of natural gas for the interstate market. If the property law approach advanced by the court below is upheld, future transactions inevitably will be structured to oust federal regulatory authority in the name of "freedom of contract" and the "integrity of state property law."

For example, landowners could begin to insist upon short-term leases. During the lease term, the leaseholder might commence sales in interstate commerce, thereby allowing the landowner to benefit from the availability of a market for his gas. But under the Court of Appeals decision, at the end of the term the landowner could reassess the relative burdens and benefits of interstate deliveries and effectively and abruptly terminate service.[6] It is no answer to argue that the Commission could refuse to certificate service from short-term leases—in that case the entire supply might never be made available to the interstate market.

The danger of other regulatory "loopholes" was identified and discussed in *Sunray, supra*, at 143-47. For example, a landowner might be willing to release the land to the producer for additional interstate deliveries only if the producer agreed to a higher royalty. The producer, his prior certificate having expired with the first lease, could then file new and higher "initial rates" under Section 4(c) of the Natural Gas Act and effectively circumvent the provisions of Section 4(d) dealing with rate changes.

Phillips Petroleum Company v. FPC, 556 F.2d 466 (10th Cir. 1977) dealt with another avenue open to leaseholders, based on retained overriding royalty interests subject to an option to convert to a specified working interest at some point in the future. It is a fairly common practice for a mineral lease owner (typically

[6]*Compare Arkansas Louisiana Gas Company v. Amarex, Inc.*, Opinion Nos. 798 and 798-A, issued May 9, 1977 and July 1, 1977, *appeal docketed sub nom. Amarex, Inc. v. FPC*, No. 77-1503 (10th Cir. July 7, 1977), involving renewal of a five-year lease executed two years after an interstate gas sales contract was signed.

a major oil producing company) to "farm out" lease acreage to a smaller producer for drilling. Under the terms of the farm-out agreement, the sub-lessor may retain an overriding royalty interest while also retaining an option to convert the royalty interest into a working interest after recovery by the sub-lessee of the costs of drilling and equipping the well.[7]

In *Phillips*, the producer exercised an option to convert to a working interest and sought to qualify its share of production for a much higher price asserting that *its share* of gas had not previously been sold in interstate commerce. The Commission ruled that Phillips' gas did not so qualify. On appeal, the Tenth Circuit dismissed Phillips' contention that the FPC decision "does violence to the law of real property," emphasizing this Court's decisions that interstate *service* cannot be abandoned without Section 7(b) approval. 556 F.2d at 469.

Similar transactions have surfaced in *Murphy Oil Corporation*, Order Modifying Initial Decision, issued July 6, 1977 in Docket No. R175-109; and *Transco Exploration Company*, Order Granting Rehearing For Purposes of Further Consideration, issued August 17, 1977 in Docket No. C177-306.

If the contrasting approach taken by the Fifth Circuit is deemed controlling, a cloud will be cast on the *Phillips* decision and a new regulatory gap opened. Undoubtedly a variety of legal arrangements will seek to exploit the gap which the decision below would create. And as pressures generated by the continuing natural gas shortage intensify, landowners and producers may be expected to seek every opportunity to maximize the return on their productive resources. If this Court affirms the decision below, those efforts will be redoubled and transactions designed solely to exempt the parties from troublesome federal regulation will be honed to perfection. The stability and security of interstate service will be undermined progressively.

---

[7]See 2 Williams & Meyers, *Oil & Gas Law*, §426 at 456-457 (1975).

Such a result is entirely inconsistent with the purposes of the Section 7(b) Natural Gas Act as declared by Congress and interpreted by this Court:

> "The Act was framed so as to afford consumers a complete, permanent and effective bond of protection from excessive rates and changes."

Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 388 (1959) (the "CATCO" case). Under the decision below, regulatory protection will last only as long as the underlying lease. The parties will thus be able to determine exactly for how long they are willing to reap the benefits of the interstate market without incurring any obligation beyond the term of the lease. Such a result goes far beyond the rights of the reversionary interest holders in the present case, and will seriously undermine effective regulation under the Natural Gas Act.

CONCLUSION

The decision of the Fifth Circuit is erroneous and if allowed to stand will significantly impair the effective administration of the Natural Gas Act. For the reasons stated above, we respectfully request this Court to reverse the decision below.

Respectfully submitted,

FREDERICK MORING
JAMES A. WILDEROTTER
PHILIP M. MARSTON

Counsel for Amicus Curiae

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

(202) 872-5000

August 31, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1977, three copies of the foregoing Motion For Leave To File Brief Amicus Curiae And Brief Amicus Curiae were mailed, postage prepaid, to counsel for all parties of record.

JAMES A. WILDEROTTER

1800 M Street, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae

APPENDIX

EXHIBIT 10 TO FPC
OPINION No. 770—A
(November 5, 1976).

Total Reserve Additions

Interstate v. Intrastate
Associated and Non-Associated Gas
(Excludes Alaska)

Year	AGA Reserve Additions Excluding Revisions (Tcf)	Interstate New Supply[a] Tcf	Interstate New Supply[a] Percent	Inferred Intrastate New Supply[b] Tcf	Inferred Intrastate New Supply[b] Percent
1966	14.8	10.0	68	4.8	32
1967	14.8	9.9	67	4.9	33
1968	9.8	6.4	65	3.4	35
1969	9.6	6.2	64	3.4	36
1970	11.3	3.5	31	7.8	69
1971	11.1	2.2	20	8.9	80
1972	10.7	5.0	47	5.7	53
1973	10.1	1.7	17	8.4	83
1974	9.7	2.4	25	7.3	75
1975	10.0	1.3[c]	13	8.7	87

---

a/Form 15, FPC, excluding revisions.

b/Derived by assuming that intrastate reserve additions are equal to the difference between total AGA reserve additions and the reserve additions committed to the interstate market.

c/Preliminary.

ASSOCIATED GAS DISTRIBUTORS

Atlanta Gas Light Co.
Baltimore gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Connecticut Natural Gas Corp.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Gas Service, Inc.
The Hartford Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
North Attleboro Gas Co.

North Carolina Natural Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Piedmont Natural Gas Company, Inc.
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.